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No. 04-1186

SUPREME COURT, U.S.
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In The Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT, III, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit correctly determined a national banking association is, within the meaning of 28 U.S.C. §1348, "located" in a state in which the national banking association operates branch offices, and therefore a citizen of that state for purposes of diversity jurisdiction.

PARTIES TO THE PROCEEDING

First Union National Bank is a real party in interest in the prior proceedings in the district court and the court of appeals. Wachovia Bank, National Association merged with First Union National Bank and is the successor by merger.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, the Respondents Daniel G. Schmidt, III, PRIAG, LLC, and DGS Investments, Inc., are not publicly held corporations or entities, and there is no parent or publicly held company owning ten percent or more of the corporations' stock. Respondent Schmidt owns ninety-eight percent of PRIAG, while DGS Investments owns the remaining two percent.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Daniel G. Schmidt, III, PRIAG, LLC, and DGS Investments, Inc., (collectively, "Respondents") respectfully request this Court deny the petition for a writ of *certiorari* filed by Wachovia Bank, National Association, f/k/a First Union National Bank ("Petitioner"), to review the decision of the Fourth Circuit court of appeals in *Wachovia Bank, National Association v. Schmidt, et al.* reported at 388 F.3d 414. Pet. App., p. 1a.

INTRODUCTION

Petitioner is challenging a majority decision of a three-judge panel of the Fourth Circuit court of appeals ("Fourth Circuit" or "court of appeals") which carefully and thoroughly determined a national banking association is "located," for purposes of 28 U.S.C. § 1348, in every state where it has a branch bank. Petitioner argues the court of appeals' application of statutory interpretation somehow runs counter to this Court's case law in that 28 U.S.C. § 1348, and its statutory predecessors, were intended to maintain jurisdictional parity between national banks and other corporations.

Not only does the Fourth Circuit's decision correctly apply the doctrines of statutory construction, it fully comports with this Court's prior decisions, including *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.

Ct. 843, 136 L. Ed. 2d 808 (1997) and *Koons Buick Pontiac GMC, Inc. v. Nigh*, __ U.S. __, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004). Petitioner would have this Court believe the Fourth Circuit ignored evidence of Congress' true intent when construing §1348, however, this simply is not supported by the record. Moreover, the Fourth Circuit's decision correctly applied the *in pari materia* canon to 28 U.S.C. § 1348 and determined the presence of branch banking offices in a state is determinative of where a national bank is "located."

The Fourth Circuit acted well within the scope of this Court's prior decisions in holding the Petitioner, through the existence of branch offices, was located in South Carolina, the state of citizenship of the Respondents. As such, there is a lack of complete diversity as required by 28 U.S.C. § 1332.

The Fourth Circuit disagrees with the decisions reached by the Fifth and Seventh Circuit Courts of Appeals,[1] concluding those decisions are unsupported by statutory and historical analysis and are not persuasive since they "amount to little more than judicial assertion of a policy preference in favor of federal forums for national banking associations." Pet. App., p. 32a. However, this is not the first instance where the federal courts of appeals differ in their interpretation of statutes involving diversity jurisdiction.

As shown below, Congress may resolve the question presented in the near future, a factor which

[1] *See Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); and *Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004).

weighs heavily against Petitioner's request for review. If the statute, as written, does not effectuate Congress' preference as to the forum for disputes such as the present case, Congress may certainly amend the statute. The Fourth Circuit, following this Court's case law, refused to usurp the role of the legislature by legislating such an amendment through judicial construction. *See Carden v. Arkoma Assoc.*, 494 U.S. 185, 197, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990).

STATEMENT OF THE CASE

Prior to 1998, Petitioner had been Respondent Schmidt's personal and business banker, and following the sale of his physical therapy companies in May, 1998, Petitioner managed substantial sums received from the sale. Based upon this pre-existing relationship, Petitioner allegedly targeted Respondent Schmidt when it learned he faced significant exposure to capital gains taxes under federal and state law. Following the sale of his company, Respondent Schmidt was approached by Petitioner's employees who told him the bank had an investment strategy that strictly complied with the United States Internal Revenue Service's rules and regulations. Pet. App. p. 48a.

In 1998, Petitioner, along with KPMG, LLP ("KPMG") and others, acted as tax and financial advisors to the Respondents. Pet. App., p. 47a. In the provision of advisory services, those trusted advisors allegedly engaged in fraud and deceit in procuring

Respondents' payment of large and excessive fees in exchange for the tax and financial services described more fully below. Pet. App., p. 48a.

Petitioner sold a number of investment strategies known as Foreign Leveraged Investment Programs ("FLIP") to wealthy individuals, including the Respondents, which were devised, in part, to provide a so-called "basis shift" to shelter capital gains. Pet. App., p. 48a. Petitioner strongly recommended the Respondents take part in the tax strategy but failed to warn them about the possibility of penalties and other risks which were allegedly known to Petitioner, KPMG and QA Investments. Pet. App., p. 48a.

Petitioner allegedly marketed the tax strategy as "legal," "bullet proof," a "clean deal," "never audited," and that it strictly complied with the United States Internal Revenue Service's ("IRS") rules and regulations. Pet. App., p. 48a. Respondents also received a tax opinion letter which falsely stated the tax strategy was legal. Pet. App., p. 48a. Respondent alleges the Petitioner and KPMG never disclosed the true nature and risks of the strategy to Respondents.

In reality, the tax strategy promoted and sold by Petitioner contained serious undisclosed tax risks which were known or should have been obvious to Petitioner (and other defendants) but not disclosed. Pet. App., p. 48a. Those concealed tax risks included the possibility the IRS would not only deny the capital loss, resulting in an increased tax liability and

accompanying interest, but impose accuracy-related penalties. Pet. App., p. 48a.

The Respondents commenced a civil action in the South Carolina Court of Common Pleas, Thirteenth Judicial Circuit, County of Greenville, on April 10, 2003, and thereafter amended the complaint on May 20, 2004 (the "state court"). Pet. App., p. 47a. The state court case is styled as *DANIEL G. SCHMIDT, III, PRIAG, LLC, and DGS INVESTMENTS, INC., v. KPMG, LLP, PILLSBURY WINTRHOP, LLP, f.k.a. Pillsbury Madison & Sutro, LLP, WACHOVIA BANK, N.A., f.k.a. First Union National Bank, QA INVESTMENTS, LLC, QUELLOS GROUP, LLC, as successor in interest to Quadra Capital Management, LP, Quellos Capital Management, LP, as successor in interest to Quadra Capital Management, LP,* Civil Action No. 2003-CP-23-2470.

The state court causes of action alleged against Petitioner are: civil conspiracy, fraud, constructive fraud, negligent misrepresentation, promissory estoppel, South Carolina Unfair and Deceptive Trade Practices Act, breach of fiduciary duty, aiding and abetting, and declaratory relief (premised on allegations that Petitioner's fee agreement is illegal, unethical, void, contrary to public policy and unenforceable). Pet. App., p. 48a - 49a. Respondents have now resolved their claims with all of the defendants except the Petitioner.

On the basis of diversity jurisdiction and provisions of the Federal Arbitration Act, Petitioner commenced a federal court proceeding by filing a petition to compel arbitration in the United States

District Court for the District of South Carolina ("district court"). KPMG and the remaining defendants in the state court case filed their motions to compel arbitration in the state court, wherein the state court judge denied those motions to compel arbitration.

The district court denied Petitioner's federal court petition for an order of arbitration and motion to compel arbitration by Order dated August 1, 2003. Pet. App., p. 47a. Petitioner appealed the district court's decision to the Fourth Circuit. However, the ultimate decision issued by the Fourth Circuit does not reach the arbitration issue since the court of appeals found the district court lacked federal jurisdiction. The Fourth Circuit held Petitioner and Respondents are citizens of South Carolina pursuant to 28 U.S.C. § 1348, and that diversity jurisdiction was lacking. Pet. App., p. 32a.

REASONS FOR DENYING THE PETITION

Petitioner would have this Court believe the Fourth Circuit's decision involves a jurisdictional issue of "great legal and practical significance" (*see* Pet, p. 5), and upsets settled expectations under federal law. As shown more fully below, there are numerous decisions involving jurisdiction in which the courts of appeals are split. This Court need not be compelled to address every such division simply because the question is one of federal jurisdiction.

Petitioner would further have this Court believe the notion of "jurisdictional parity" between national banks and other corporations dictates the judicial construction of 28 U.S.C. § 1348. However, the history of § 1348 reveals only that its purpose was to guarantee national banks are subject to the rules of diversity jurisdiction, as opposed to the automatic federal question jurisdiction arising solely from a national bank's federal charter.

Finally, the Petitioner asserts the Fourth Circuit's mode of analysis cannot be reconciled with this Court's opinion in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) and *Koons Buick Pontiac GMC, Inc. v. Nigh*, __ U.S. __, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004). Respondents submit the Fourth Circuit's decision provides a detailed determination of the plainness of § 1348 by analyzing (1) the ordinary meaning of "located," (2) its use in juxtaposition with the contrasting term "established" in § 1348, and (3) this Court's construction of "located" in a parallel venue statute in *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 98 S. Ct. 88, 54 L. Ed. 2d 218 (1977). Pet. App., p. 1a - 32a. Moreover, the Fourth Circuit's decision is supported by the application of the *in pari materia* canon to the statutory term of "located" in 28 U.S.C. § 1348. For all of the following reasons, this Court should deny review of the Fourth Circuit's decision.

I. CIRCUIT SPLITS REGARDING DIVERSITY JURISDICTION ARE NOT EXTRAORDINARY.

Petitioner asserts the questions presented are ripe for consideration by this Court because the Fourth Circuit disagrees with the analyses of the Fifth and Seventh Circuit Courts of Appeals. Pet., p. 9. However, entities often endure different treatment depending upon the location of the proceeding within the federal courts of appeals.

Several recent federal court opinions involving diversity jurisdiction focus on the federal courts' continuing adherence to Congress' intent to restrict a party's access to federal court. Not surprisingly, various circuits have reached inconsistent conclusions, giving rise to splits of authority on issues such as diversity jurisdiction. Such division among the courts of appeals does not necessarily, or automatically, give rise to an important or exceptional circumstance justifying this Court's review.

In fact, the citizenship of entities for purposes of diversity jurisdiction is often an issue in which the circuit courts are divided. To explain, 28 U.S.C. § 1332(c)(1) addresses the issue of corporate citizenship, providing that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *See* 28 U.S.C. § 1332(c)(1) (2000). A corporation is not a citizen of *either* its state (or states) of incorporation *or* principal place of business, but instead, is a citizen of *both* states. Courts use a number

of *different* approaches in determining a corporation's principal place of business.

The First and Seventh Circuits apply the "nerve center" test, which determines the principal place of business by looking to where the management and policy-making activities take place. *See, e.g., Topp v. CompAir Inc.*, 814 F.2d 830, 834 (1st Cir. 1987); *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991). In contrast, the Third and Fifth Circuits apply the "place of activity" test which looks to the center of the corporation's production and service activities. *See, e.g., Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960); *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 n.4 (5th Cir. 1992). Finally, many courts apply the "total activity" test, treating it as a hybrid of the first two. *See, e.g., Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909 (10th Cir. 1993), *cert. denied*, 510 U.S. 1112, 114 S. Ct. 1057, 127 L. Ed. 2d 377 (1994); *Bel-Bel Int'l Corp. v. Community Bank of Homestead*, 162 F.3d 1101, 1106-07 (11th Cir. 1998).

There also is a circuit split regarding the citizenship of defunct corporations. The Second Circuit takes the strictest approach finding a defunct corporation's citizenship is determined "not only by its state of incorporation but also by the place it last transacted business." *See Wm. Passalacqua Builders, Inc. v. Resnick Developers S. Inc.*, 933 F.2d 131, 141 (2d Cir. 1991). The Third Circuit, on the other hand, has adopted the view that an inactive corporation has no principal place of business and, accordingly, is only a citizen of the state of incorporation. *See Grand Union Supermarkets of the Virgin Islands, Inc. v. H.E. Lockhart*

Management, Inc., 316 F.3d 408 (3d Cir. 2003); and *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995).

Respondents submit the division among the courts of appeals on the interpretation of the statutory word "located" for diversity purposes does not necessarily, or automatically, give rise to an important or exceptional circumstance justifying this Court's review. The current climate indicates the present legal issue is in a state of flux and would benefit from further consideration by the courts of appeals and district courts.

Finally, Petitioner goes to great lengths to show the demographic information for federally-insured institutions. However, Petitioner failed to show how national banks would be prejudiced from having their cases heard in state courts, such as South Carolina's state court, particularly when the very demographic information cited indicates the Petitioner has 176 branch offices in South Carolina. Pet., p. 9. National uniformity on this particular issue of diversity jurisdiction is not essential to warrant review of the federal diversity jurisdiction issue.

II. THIS COURT PREVIOUSLY DENIED *CERTIORARI* ON THE QUESTION PRESENTED BY PETITIONER

This Court previously denied *certiorari* on the issue of whether branch banking in a state other than a national bank's principal place of business gives rise to citizenship in the state where the branch bank is

located. In *Southland Mobile Homes of South Carolina, Inc. v. Associates Fin. Serv. Co., Inc.*, 270 S.C. 527, 244 S.E.2d 212 (S.C. 1978), *cert. denied sub nom.*, 439 U.S. 900, 99 S. Ct. 266, 58 L. Ed. 2d 248 (1978), Southland brought a suit against Mellon Bank, N.A. (Mellon Bank) to recover damages for breach of contract. Mellon Bank was a national banking association organized under the provisions of Title 12 of the United States Code.

One of the issues before the South Carolina Supreme Court was whether Mellon Bank, with its principal place of business in Allegheny County, Pennsylvania, was "located" in Sumter County, South Carolina, for purposes of jurisdiction under 28 U.S.C. § 1348. The court in *Southland* elaborated on the meaning of an authorized branch. It was decided Mellon Bank conducted "branch banking" in South Carolina and that it was therefore "located" there based upon the finding that Mellon Bank had received checks, loaned money and conducted all other business necessary for the receipt and disbursement of funds through the office of an authorized agent, Associates Financial Services Company, Inc., in Sumter County, South Carolina. These transactions were conducted pursuant to the explicit directions of the Mellon Bank.

The South Carolina Supreme Court went on to hold that because Mellon Bank had a branch bank in Sumter County, South Carolina, it was "located" there for jurisdictional purposes pursuant to 28 U.S.C. § 1348. *Id.* at 532. Mellon Bank filed a petition for *certiorari*, which this Court denied. *See Mellon Bank, N.A. v. Southland Mobile Homes of S.C., Inc.*, 439 U.S. 900, 99 S. Ct. 266, 58 L. Ed. 2d 248 (1978).

III. THE QUESTION PRESENTED IS NOT RIPE FOR CERTIORARI

The Fourth Circuit's decision relates to the construction of a federal statute. There is no need for this Court to review such an interpretation when (1) Congress is well able to clarify or enact specific statutory language concerning jurisdictional issues as it deems appropriate; and (2) recent activity before Congressional Committees indicates Congress may be willing to clarify or specify the citizenship of federal lending institutions.

First, other federal statutes dealing with lending institutions indicate Congress is fully capable of addressing where a lending institution is "located" for purposes of diversity jurisdiction. One example can be found in 12 U.S.C. § 2258, which deals with the Farm Credit System (a type of lending institution), which states:

> Each institution of the System shall for the purposes of jurisdiction be deemed to be a citizen of the State, commonwealth, or District of Columbia in which its **principal office is located**. (Emphasis added).

Second, a bill recently passed in the United States House of Representatives and currently in a Senate committee shows Congress may specify the location of lending institutions such as national banks for diversity jurisdiction purposes. In March 2004, the House passed H.R. 1375, entitled the *Financial Services Regulatory Relief Act*, which purports to reduce the

regulatory burden on financial services firms and improve productivity for insured depository institutions.

In particular, H.R. 1375, 108th Cong. § 213 (2004),[2] seeks to amend the Home Owners' Loan Act, 12 U.S.C. § 1464, by adding the following subsection:

> (x) HOME STATE CITIZENSHIP - In determining whether a Federal court has diversity jurisdiction over a case in which a Federal savings association is a party, the Federal savings association shall be considered to be a citizen only of the State in which such savings association has its home office.

As shown by the current enactment of 12 U.S.C. § 2258, and the proposed amendment to 12 U.S.C. § 1464 (through H.R. 1375), Congress is cognizant of the ways in which it could specify the word "located" for purposes of diversity jurisdiction. In fact, recent testimony before the Congressional Committee on Banking, Housing and Urban Affairs indicates the very question presented to this Court has been brought to the attention of Congress. *See The Financial Services Roundtable: Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004) (Statement of William A. Longbrake, p. 5-6). Specifically, on June 22,

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[2] *See also* S. 1812, 108th Cong. (2003), a bill previously introduced in the Senate which proposes the identical amendment discussed in H.R. 1375.

2004, the Committee on Banking, Housing and Urban Affairs heard the following testimony:

> [F]urther clarification also may be needed to update the existing provision that specifies which state a national bank is **located** for purposes of federal court jurisdiction.

Id., at p. 6 (Emphasis added).

In holding the citizenship of limited partners had to be taken into account to determine diversity of citizenship among the parties in action brought by limited partnership, this Court has stated:

> [T]he course we take today does not so much disregard the policy of accommodating our diversity jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives. Such accommodation is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word "citizen."

See Carden v. Arkoma Assoc., 494 U.S. 185, 197, 110 S. Ct. 1015, 108 L.Ed.2d 157 (1990).

In the present case, the Fourth Circuit stated:

> [W]e hold that a national banking association is "located" under section 1348 in any state where it operates branch offices. *** If the statute as written does not effectuate Congress' preference as to forum for such disputes as this, Congress may amend the statute. But for the courts to legislate such an amendment would be both to usurp the role of the legislature and to abdicate the role assigned to the judiciary.

Pet. App., pp. 31a-32a. Congress may take action to specify in which state a national bank is located for purposes of federal court jurisdiction, thereby preventing this Court from being forced to judicially amend the statute in an effort to anticipate what language Congress actually enacted. Respondent requests this Court deny Petitioner's request for review pending Congressional specification on the question presented.

IV. THE ORDINARY MEANING OF "LOCATED" IS NOT AMBIGUOUS, BUT INSTEAD, SUGGESTS A NATIONAL BANK IS "LOCATED" WHEREVER IT HAS PHYSICAL PRESENCE

The Fourth Circuit did not implicitly assume 28 U.S.C. § 1348 is an unambiguous statute, nor did it overlook the broader context in which the statute

appears. As opposed to a mere assumption, the majority opinion made a detailed determination of the plainness of the statutory language in § 1348. The court of appeals analyzed (1) the ordinary meaning of "located," (2) its use in juxtaposition with the contrasting term "established" in § 1348, and (3) the Supreme Court's construction of "located" in a parallel venue statute in *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 98 S. Ct. 88, 54 L. Ed. 2d 218 (1977).

The majority opinion correctly found there was no ambiguity in the *ordinary* meaning of the word "located." Pet. App., p. 5a. It is an axiom of statutory interpretation the plain meaning of an unambiguous statute governs, barring exceptional circumstances. *See Rubin v. United States*, 449 U.S. 424, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981). Where, as here, the statute does not provide an express definition for the term in question, the courts construe the statutory term in accordance with its ordinary or natural meaning. *See FDIC v. Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

In ordinary parlance, the word "located" is a general term referring to physical presence in a place. A national banking association becomes physically present in a state when it opens branch offices and conducts business in that state. *See, e.g.*, 12 U.S.C. § 92 (authorizing any national bank "*located and doing business* in any place the population of which does not exceed five thousand inhabitants" to operate as an insurance agent) (emphasis added)).

In 1948, when § 1348 was re-codified in Title 28, and in 1887,[3] when the phrase "citizens of the States in which they are respectively located" was first added to the predecessor statute to § 1348, the word "located" referred to physical presence in a place. Pet. App., pp. 4a-5a. Petitioner's assertion that the word "located" is ambiguous is without merit since no definition or *ordinary* meaning of the word "located" requires the "particular or specific location" be unique or exclude other distinct locations. Furthermore, the definitions cited by the Seventh Circuit actually supports the Fourth Circuit's conclusion the word "located" unambiguously includes *branch offices*. Pet. App., pp. 6a-7a.

In analyzing the specific context in which "located" is used within § 1348, the majority opinion looked at the statute's use of two distinct terms to refer to the presence of a banking association: "established" and "located." Pet. App., p. 8a. "It is a principle of statutory interpretation that different words used in the same statute should be assigned different meanings whenever possible." *See, e.g., Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001).

The Fourth Circuit concluded the place where a national bank is "established" refers to the bank's charter location and the place where it is "located" refers to the place or places where it has a physical

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[3] *See e.g.*, 22 Stat. 162, 163 (1882) ("the 1882 Act"); 24 Stat. 552 ("the 1887 Act"); 25 Stat. 433 (1888)(corrective text); 36 Stat. 1091 (1911); and 28 U.S.C. § 1348 (1948 re-codification of current statute)

presence. It is reasonable to give independent meaning to the distinct terms in § 1348, particularly since the Supreme Court attributed the same two definitions to "established" and "located" in the former venue statute for national banks. *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 98 S. Ct. 88, 54 L. Ed. 2d 218 (1977); *see also* 12 U.S.C. § 30(b) (A national bank is originally and permanently *established* at its main office, which cannot be moved more than thirty miles outside the city of its original location, and even then only with approval of two-thirds of the shareholders and the Comptroller of the Currency); and 12 U.S.C. § 36(i) (A bank is thereafter and temporarily *located* at its branch office, which it can open and move at will, subject to the approval of the Comptroller).

Examining the broader context of § 1348 as a whole, the majority and dissent opinions agree 28 U.S.C. § 1348, and former 12 U.S.C. § 94 (the venue statute discussed in *Bougas*), both concern the same relevant subject matter – i.e., whether a national bank may initiate suit or be sued in federal court. Pet. App., pp. 15a, 42a-43a.

This Court construed the word "located" in former 12 U.S.C. § 94 to be distinct from the word "established" when used in the same statute. *Bougas, supra,* 434 U.S. at 44. Furthermore, this Court did not read the word "located" to mean *only* the principal place of business. *Id.,* 434 U.S. at 43-44. The Fourth Circuit rejected the notion the place in which a bank is "located" could fairly be understood to refer to the place where it primarily or principally conducts business. Pet. App., pp. 10a-11a.

Thus, when the word "located" is read in its plain and ordinary meaning, in the specific context of § 1348, and in the broader context of other statutes, it is clear the Fourth Circuit correctly concluded "located" is unambiguous.

V. PETITIONER'S "JURISDICTIONAL PARITY" ARGUMENT LEADS TO A PATENTLY UNREASONABLE INTERPRETATION OF 28 U.S.C. § 1348.

Petitioner would have this Court believe the Fourth Circuit's decision should be reviewed to correct the apparent disregard of this Court's decisions regarding § 1348 and its predecessors. However, this assertion, which is purportedly supported by Petitioner's jurisdictional parity argument, fails for several important reasons.

Petitioner asserts the Fourth Circuit's decision cannot be reconciled with Congress' intention to maintain jurisdictional parity between national banks and other corporations. Pet., pp. 11-14. As stated above, the Fourth Circuit correctly found § 1348 was unambiguous and such finding does not warrant a review of Congress' legislative purpose. *See Robinson, supra,* 519 U.S. at 340.

Petitioner also asserts the Fourth Circuit's decision fails to appreciate the history of § 1348 which indicates Congress' intent to maintain jurisdictional parity between national banks and state banks and other corporations. Pet., pp. 11-14. Even assuming the statutory history of § 1348 reveals its purpose was to

accord national banks the same access to the federal courts as that enjoyed by state banks and corporations, such principle would only guarantee that national banks are subject to the rules of diversity jurisdiction, instead of automatically triggering federal question jurisdiction on the basis of a federal charter. *See Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644,648, 12 S. Ct. 325, 35 L. Ed. 1144 (1892) (noting the purpose of the 1882 Act was to eliminate federal "arising under" jurisdiction for suits involving national banks).

To the extent the statutory history of § 1348 places national banks on "parity" with state banks and corporations, it does so only in the limited sense that the access of all three to the federal courts would now be determined by their *citizenship* in various states – rather than by the existence of a federal charter. Pet. App., p 25a – 27a. Nothing in *Petri* can be construed to require the same rules regarding the technical qualifications for state citizenship must apply both to national banks and to corporations. This is true because the *Petri* court could not have envisioned a national bank's ability to be a citizen of more than one state through branch offices. *See Bougas, supra*, 434 U.S. at 43.

Petitioner, as well as the dissent and the Fifth and Seventh Circuits rely upon the following language from *Petri* to support its principle of jurisdictional parity:

> No reason is perceived why it should be held that congress [sic] intended [in the predecessor to § 1348] that national banks should not resort to federal tribunals as other corporations and individual citizens might do.

Petri, 142 U.S. at 650-51; *see also Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); and *Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004). This language and the holding of *Petri* establishes only the general conclusion that federal courts could exercise diversity jurisdiction over national banks, just as they do over corporations and individual citizens. This language, however, does not support the specific conclusion that the identical *criteria of state citizenship* must apply to national banks.[4]

"The 1882 Act and the 1887 Act were designed to overcome the effect of [prior statute], which allowed national banks to sue and be sued in the federal district and circuit courts solely because they were national banks, without regard to diversity..." *See Mercantile Nat'l Bank at Dallas v. Langdeuau*, 371 U.S. 555, 565-566, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963). Cases such as *Langdeuau* and *Petri* merely confirm Congress' intent in the 1882 and 1887 Acts to establish "parity" in the limited sense of abolishing automatic federal question jurisdiction for suits involving national banks.

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[4] The Fourth Circuit determined Petitioner's out-of-context quotation of *Petri* misleadingly implied the criteria of state citizenship of corporations (i.e. citizenship based on principle place of business) must apply to national banks. Pet. App., p 29a.

In *Continental National Bank of Memphis v. Buford*, 191 U.S. 119, 123-124, 24 S. Ct. 54, 56, 48 L. Ed. 119, this Court held:

> The necessary effect of [Sec. 4 of the 1882 Act] was to make national banks *** citizens of the states in which they were respectively located, and to withdraw the right to invoke jurisdiction of the circuit courts of the United States simply on the grounds that they were created by, and exercised their powers under, acts of Congress. **No other purpose can be imputed to Congress than to effect that result.**

(Emphasis added). As this Court's precedent reveals, the legislative history of 28 U.S.C. § 1348 indicates an intent to **reduce** federal court jurisdiction. It is illogical to assume Congress also intended to expand federal jurisdiction when locally present national banks invoke diversity jurisdiction against other local citizens. Since this Court has held § 1348 and its predecessors were enacted to limit federal court jurisdiction, then § 1348 should not be interpreted in a manner which expands such jurisdiction, particularly when there is no concern for local bias.

According to the FDIC Institution Directory, Petitioner has 176 branch offices in South Carolina. Thus, there can be no fear by Petitioner that state courts would be prejudiced against national banks (as an out-

of-state party) when the national bank has 176 branches in the state. *See* FDIC Institution Directory, http://www2.fdic.gov/idasp/main.asp (last visited May 13, 2005) (providing demographic information about federally-insured institutions, current as of May 12, 2005). This Court previously limited diversity jurisdiction when Congress' original purpose, namely to protect out-of-state litigants from local prejudice in state courts, is no longer necessary due to advancements in travel, communication and globalization. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

VI. APPLICATION OF THE *IN PARI MATERIA* CANON APPROPRIATELY RESOLVES THE ISSUE.

Statutes that are *in pari materia* or relating to the same subject matter are to be interpreted in light of, and consistently with, one another. *See United States v. Stewart*, 311 U.S. 60, 61 S. Ct. 102, 85 L. Ed. 40 (1940). This interpretive principle is applicable when the two statutes adopt a single consistent vocabulary in reference to the same subject matter. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 990 S. Ct. 2066, 60 L. Ed. 2d 609 (1979).

It is undisputed at the time Congress established and reenacted § 1348, it adopted the same vocabulary – the terms "established" and "located" – to refer to the same subject matter, namely the location of national banking associations in relation to their capacity for

suit, as did the former venue statute (12 U.S.C. § 94).[5] Since this Court in *Bougas* provided the definitive construction of those terms in the venue statute, the *in pari materia* canon directs the adoption of the same construction for the jurisdiction statute.

Petitioner asserts the *in pari materia* canon should not apply because there are basic and historic differences between the concepts of subject matter jurisdiction and the concept of venue. However, the *relevant* subject matter in the venue and diversity jurisdiction statutes is identical in that both concern whether a national bank may initiate suit or be sued in federal court.

The observation that venue serves litigants' convenience, while diversity jurisdiction is concerned with bias, does not defeat the application of the canon. Courts have never insisted on such absolute identity of purpose; otherwise, no two statutes would ever be sufficiently similar to warrant application of the canon. *See, e.g., Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964) (patent law and antitrust law are *in pari materia*); *Hallenbeck v. Penn. Mut. Life Ins. Co.*, 323 F.2d 566, 571 (4th Cir. 1963) ("It is well established that statutes which relate to the same persons or things, or the same class of persons or things, *or* have a common purpose may be regarded as 'in pari materia.'")(Emphasis added).

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[5] As the Fourth Circuit correctly determined, subsequent amendment or repeal of a statute generally does not render it irrelevant to *in pari materia* analysis. Pet., p. 14a, n. 2.

The canon is applicable if it is natural and reasonable to think Congress, in specifying the presence of national banks to determine their capacity to sue and be sued in federal courts, would use the words "established" and "located" consistently in the two statutes. *See* 2B *Sutherland's Statutory Construction* § 51.03, at 212. In the alternative, the Fourth Circuit relied on *Overstreet v. North Shore Corp.*, 318 U.S. 125, 129-130, 63 S. Ct. 494, 87 L. Ed. 656 (1943) for the proposition that identical words, even occurring in *unrelated* statutes, should be interpreted to have identical meanings whenever reasonably possible. Pet. App. P. 17a.

This Court should deny Petitioner's request for review since the Fourth Circuit appropriately applied the *in pari materia* canon to 28 U.S.C. § 1348 in order resolve the question presented in favor of Respondents.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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